Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

HARVEY P. WHITE, *et al.*,

Petitioners,

v.

HOMER A. WHITTINGTON, JR., as Trustee for the Homer A. Whittington, Jr. Revocable Trust, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Mississippi

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In determining whether the requirement to arbitrate under Section 2 of the Federal Arbitration Act applies to non-signatories, does state law or federal arbitral estoppel law govern where the parties' conduct is unrelated to the formation or revocation of the agreement to arbitrate?

LIST OF PARTIES TO THE PROCEEDING

Respondents (plaintiffs) are: Homer A. Whittington, Jr., as Trustee for the Homer A. Whittington, Jr. Revocable Trust; Edwin Dodd; Douglas Packer; Robert G. Germany; Joseph E. Roberts, Jr.; C. Victor Welsh, III; Crymes M. Pittman; Lucy P. Culver; Jeffrey L. Smith; Crymes G. Pittman, individually and as Trustee for the Homer A. Whittington, Jr. Deferred Compensation Trust; Yerger Properties, LP; Lyndel B. Smith and Shirley E. Smith, as Trustees for the Smith Family Trust; Betty Sue Yandell; Y. Clifton Yandell; William M. Yandell, Jr.; William M. Yandell, III, individually and as the registered owner of the William M. Yandell, III IRA; Blue Mountain Wireless, LLC; W.M. Yandell FLP, LP; Susan Yandell McKee; Walcott and Caldewell, LLC; Dr. Richard Rushing; Dr. Jane T. Mills; William P. Thomas; Darden North; Terrell Williams; Wirt A. Yerger, Jr.; James T. Thomas, IV; Claiborne P. Deming; David L. Meredith; Mary Jane Finney; David Bailey; Kim McDonald; Debra Morton; Gordon Morton; Gordon Morton IRA; Ann Carter Thomas; Betty J. Thomas Marital Trust; Bill Thomas; James T. Thomas; Martha Ross Thomas; W.P. Thomas, Jr.; Elaine A. Chatham; Henry E. Chatham, Jr.; Franklin E. Chatham; Marie D. Chatham; Retirement Plan for Employees Wise Carter Child & Caraway; James C. Eckert; Lori Moskowitz; and Bertie Heiner.

LIST OF PARTIES – Continued

Respondent Qualcomm Inc. is a defendant.

Respondent American Wireless License Group, LLC ("AWG") is a plaintiff in a separate proceeding. *See* note 1, *infra*.

Petitioners (Defendants) are Harvey P. White, Scot B. Jarvis, Susan G. Swenson, Thomas J. Bernard, Jeffrey P. Williams, Anthony R. Chase, Michael B. Targoff, Jill E. Barad, Robert C. Dynes, James E. Hoffmann, Stewart Douglas Hutcheson, Daniel O. Pegg, and Leonard C. Stephens.

RULE 29.6 STATEMENT

Petitioners are individuals and as such do not have parent companies.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES TO THE PROCEEDING	ii
RULE 29.6 STATEMENT	iii
TABLE OF AUTHORITIES	xi
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
A. The Agreement Between Leap And AWG To Purchase Licenses In Exchange For Registration Of Stock	3
B. The Lawsuit By AWG And Its Members	5
C. Proceedings In the Mississippi State Courts	6
D. The Mississippi Supreme Court's Decision	9
REASONS FOR GRANTING THE PETITION	10
I. THIS COURT SHOULD RESOLVE A CONFLICT BETWEEN FEDERAL AND STATE COURTS REGARDING WHETHER UNDER THE FEDERAL ARBITRATION ACT FEDERAL ARBITRAL ESTOPPEL OR STATE LAW APPLIES TO NON-SIGNATORIES	10

TABLE OF CONTENTS – Continued

Page

A. Defendants Relied On Well Recognized Federal Arbitral Estoppel 14

"Direct Benefits" Estoppel 14

Equitable Estoppel 17

Federal Arbitral Law Regarding Non-Signatory Plaintiffs And Non-Signatory Defendants 20

B. The Mississippi Supreme Court Erred In Its Failure To Follow Federal Arbitral Estoppel, Which That Court Has Chosen To Reject In Favor Of Mississippi State Law 22

C. The Decision Reflects Disagreement And Uncertainty Among State And Federal Courts Whether Federal Arbitral Estoppel Or State Law Applies, Which Uncertainty This Court Alone Can Dispel 28

Division Among State Courts 28

Uncertainty Concerning Governing Law 31

CONCLUSION 35

TABLE OF APPENDICES

Appendix A – Decision of the Mississippi supreme court, dated November 15, 2007 .....App. 1

Appendix B – Order of the circuit court of Hinds County, Mississippi, dated September 13, 2005 .....App. 32

TABLE OF AUTHORITIES

Page

CASES

Adams v. Greenpoint Credit, LLC, 943 So. 2d 703 (Miss. 2006) 23, 27

Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995) 11, 34

Am. Bureau of Shipping v. Tencara Shipyard S.P.A., 170 F.3d 349 (2d Cir. 1999) 17

B.C. Rogers Poultry, Inc. v. Wedgeworth, 911 So. 2d 483 (Miss. 2005) ..... *passim*

Barrowclough v. Kidder, Peabody & Co., 752 F.2d 923 (3d Cir. 1985), *overruled on other grounds by Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110 (3d Cir. 1993) 22

Bridas S.A.P.I.C. v. Gov't of Turkmenistan, 345 F.3d 347 (5th Cir. 2003) 15, 23

Brown v. Pac. Life Ins. Co., 462 F.3d 384 (5th Cir. 2006) 19

CD Partners, LLC v. Grizzle, 424 F.3d 795 (8th Cir. 2005) 19

Choctaw Generation Ltd. P'ship v. Am. Home Assurance Co., 271 F.3d 403 (2d Cir. 2001) 19

Deloitte Noraudit A/S v. Deloitte Haskins & Sells, U.S., 9 F.3d 1060 (2d Cir. 1993) 17

Denney v. BDO Seidman, L.L.P., 412 F.3d 58 (2d Cir. 2005) 22

TABLE OF AUTHORITIES – Continued

Page

E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S., 269 F.3d 187 (3d Cir. 2001) 23

First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995) 2, 11, 33

Fleetwood Enters. v. Gaskamp, 280 F.3d 1069 (5th Cir. 2002) 33

Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444 (2003) 2

Grigson v. Creative Artists Agency, L.L.C., 210 F.3d 524 (5th Cir. 2000) 19

Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79 (2002) 2

In re Kaiser Group Int'l, Inc., 307 B.R. 449 (D. Del. 2004) 23

In re Kellogg Brown & Root, Inc., 166 S.W.3d 732 (Tex. 2005) 14, 29, 32

In re Merrill Lynch Trust Co. FSB, 235 S.W.3d 185 (Tex. 2007) 14, 30, 31

In re Oil Spill, 659 F.2d 789 (7th Cir. 1981) 20

In re Weekley Homes, L.P., 180 S.W.3d 127 (Tex. 2005) 30

Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411 (4th Cir. 2000) 16, 17, 34

JLM Indus. Inc. v. Stolt-Nielsen SA, 387 F.3d 163 (2d Cir. 2004) 19

TABLE OF AUTHORITIES – Continued

Page

John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964) 33

Johnson v. Polaris Sales, Inc., 257 F. Supp. 2d 300 (D. Me. 2003) 22

Letizia v. Prudential Bache Sec., Inc., 802 F.2d 1185 (9th Cir. 1986) 19

MS Dealer Serv. Corp. v. Franklin, 177 F.3d 942 (11th Cir. 1999) 18

Martinez v. Court of Appeal, 528 U.S. 152 (2000) 14

Metalclad Corp. v. Ventana Envtl. Organizational P'ship, 109 Cal. App. 4th 1705 (2003) 29

Mississippi Fleet Card, L.L.C. v. BilStat, Inc., 175 F. Supp. 2d 894 (S.D. Miss. 2001) 20

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) 10

Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983) 10, 33, 34

Perry v. Thomas, 482 U.S. 483 (1987) 2, 11, 33

Terminix Int'l, Inc. v. Rice, 904 So. 2d 1051 (Miss. 2004) ..... *passim*

Turtle Ridge Media Group, Inc. v. Pac. Bell Directory, 140 Cal. App. 4th 828 (2006) 29

United States v. Romani, 523 U.S. 517 (1998) 14

Wash. Mut. Fin. Group, LLC v. Bailey, 364 F.3d 260 (5th Cir. 2004) 15, 32, 33, 34

TABLE OF AUTHORITIES – Continued

Page

STATUTES

9 U.S.C. §§ 1-16 1

9 U.S.C. § 2 ..... *passim*

9 U.S.C. § 3 6

9 U.S.C. § 4 6

28 U.S.C. § 1257(a) 1

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The decision of the Mississippi supreme court is not published but appears at ___ So. 2d ___, No. 2005-IA-01827-SCT, 2007 WL 3378563 (Nov. 15, 2007). It is reprinted at Appendix A. The decision of the circuit court of Hinds County, Mississippi denying the motion to compel arbitration and stay proceedings and motion to dismiss is unreported and reprinted at Appendix B.

STATEMENT OF JURISDICTION

The Mississippi supreme court rendered or entered its decision on November 15, 2007 ("Decision"). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

This case presents questions of statutory interpretation under the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, and specifically § 2, which provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a

> contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

STATEMENT OF THE CASE

This Court has recently addressed "gateway" disputes that raise a "question of arbitrability" under the Federal Arbitration Act. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452 (2003); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83-84 (2002). This case raises an important and recurring issue of law that is just such a "gateway" issue. Specifically, in deciding whether non-signatories are subject to an arbitration agreement when estoppel principles are invoked, does state law or federal substantive law apply? This Court has stated that when questions concerning initial formation of the underlying agreement are raised, determining the parties to an arbitration is resolved as a matter of state law. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995); *Perry v. Thomas*, 482 U.S. 483, 492 (1987).

But this Court has not addressed whether federal or state law governs estoppel. Federal courts have developed substantive arbitral estoppel to prevent inequity where a non-signatory plaintiff tries to "have it both ways," seeking to impose liability in connection with or obtain benefits from the underlying agreement, while simultaneously denying applicability of the

arbitration clause based on the absence of an actual signature.

The Mississippi supreme court erred in its failure to follow federal arbitral estoppel. Although there is little explanation of the court's reasoning, recent decisions from that court reveal its express rejection of federal arbitral estoppel in favor of Mississippi state law, which applies dramatically different principles. Federal courts and the Mississippi supreme court are in direct conflict over which body of law governs. Other states, such as California, apply federal arbitral law while Texas applies state law. The Texas supreme court has acknowledged that the absence of direction from this Court in instructing whether state or federal substantive law governs has left Texas' law "tentative." This Court is the only Court which can end the uncertainty over whose law governs. For this reason, this Court should grant the Petition.

A. The Agreement Between Leap And AWG To Purchase Licenses In Exchange For Registration Of Stock

This dispute concerns a pending arbitration between a signatory to an arbitration clause and the non-signatory officers and directors of the other now bankrupt entity that signed the arbitration. The issue is whether the owners of the plaintiff signatory who did not formally sign the underlying agreement can be compelled to be brought into the fold and made

to arbitrate their overlapping dispute with the same non-signatory officers and directors who have been made parties to the pending arbitration.

More particularly, Leap Wireless International, Inc. ("Leap") was a low cost-provider of wireless telephone services. As a provider, Leap had to obtain licenses issued by the Federal Communications Commission to use the radio spectrum in a particular geographic area. Leap entered into an agreement with an existing holder, American Wireless License Group, LLC ("AWG"), to acquire the latter's licenses for certain areas in the southeastern United States. As payment, Leap transferred directly to AWG approximately 1.9 million unregistered shares of Leap stock. The transaction was structured as a private offering that was not subject to the registration requirements of the Securities Act of 1933 ("1933 Act"). The agreement between Leap and AWG (the "Agreement") was entered on February 7, 2001, and closed on June 8, 2001. The Agreement contained an arbitration clause.

AWG is a Mississippi limited liability company, comprised of about 113 members or shareholders. Some of these investors did not qualify to participate in the private offering for the sale of unregistered shares of Leap stock. Accordingly, under the Agreement, Leap agreed to register the shares that it had transferred to AWG so that AWG could sell them. On June 11, 2001, Leap registered AWG's Leap stock by filing with the Securities & Exchange Commission ("SEC") a Form S-3 registration statement (the

"Registration Statement"). AWG's members bought shares several months after the registration.

B. The Lawsuit By AWG And Its Members

On December 31, 2002, a number of AWG's members ("Respondents" or "plaintiffs") filed suit in the circuit court, First Judicial District of Hinds County, Mississippi (the "Whittington" action). They sued current and former officers and directors of Leap or its successor in interest ("Petitioners" or "individual defendants"), as well as Qualcomm Inc., from which Leap was spun off in 1998. On June 6, 2003, the same attorney brought virtually an identical lawsuit on behalf of AWG, in the same Mississippi court, alleging the same claims against the same defendants together with UBSA Paine Webber, Inc. These suits arose from alleged failures to disclose details about a brewing dispute regarding Leap's purchases of wireless licenses in New York from another holder, MCG PCS, Inc. ("MCG").

Leap's agreement with MCG was entered in September 2000 and closed in June 2001. MCG asserted that it was entitled to a purchase price adjustment that would effectively double the purchase price for the New York licenses. MCG arbitrated its dispute over the price. Ultimately, on August 6, 2002, the arbitrator ruled against Leap and determined that MCG was entitled to a purchase price adjustment of $40.8 million, payable in cash or stock. Believing it did not have sufficient excess cash to pay the award due MCG, Leap elected to pay the

award in stock. Leap issued over 21 million shares to MCG. This large number of shares was required as a result in the dramatic price decline Leap stock suffered during the technology bust. The transfer of these shares triggered an event of default (a "change of control") under Leap's vendor credit agreements. Leap's stock was delisted from trading on NASDAQ and Leap filed for bankruptcy in 2003.

AWG and its members filed two parallel suits under Sections 11 and 15 of the 1933 Act, and three claims under the statutory and common law of the State of Mississippi, based on the supposed failure to disclose in the Registration Statement "significant risks" concerning Leap's contract with MCG. Both complaints made extensive references, discussed below, to the Agreement between Leap and AWG, to the individual defendants' role in bringing that Agreement into fruition, and to the intimate relationship between those defendants and Leap.

C. Proceedings In the Mississippi State Courts

Petitioners moved the circuit court on January 28, 2005 to compel arbitration and stay proceedings under the FAA, and specifically Sections 2, 3, and 4, both against AWG's members and AWG. The Agreement contained a broad requirement to arbitrate disputes: "[S]enior management employees of [Leap] and [AWG] shall meet and negotiate in good faith to reach a satisfactory resolution of any dispute arising in connection with this Agreement. If such negotiations do not result in a resolution within five (5) days

after the first meeting of such representatives, then any dispute, claim or controversy arising under this Agreement or in any way related to this Agreement, or its interpretation, enforceability or inapplicability may be submitted to binding arbitration at the election of either [Leap] or [AWG]." Mississippi Supreme Court Record ("MSCR"), Whittington Record 229-62. In both the circuit court (MSCR, Whittington Record 1907-11 & n.4) and in the Mississippi supreme court (opening brief at 35, 41-2), the individual defendants argued that the federal substantive law applies to estop non-signatories from resisting arbitration or objecting to including Leap's officers and defendants as part of the arbitration.

In the alternative, the individual defendants moved to dismiss all of the claims for failure to state a claim. They asserted that plaintiffs lacked standing to assert a claim under Section 11 of the 1933 Act. At the time of the Registration Statement, there existed over 34 million shares of Leap stock outstanding as a result of earlier offerings. Plaintiffs did not and could not possibly plead that their shares were pursuant to the June 2001 Registration Statement that registered 1.9 million shares. On the merits, the individual defendants argued that the omissions claims were completely baseless. Leap timely and fully disclosed in its SEC filings the material risks concerning its dispute with MCG. And plaintiffs' concealment allegations, even if true, were fatal to showing the omissions caused any harm. The stock price of Leap's shares fell dramatically, from a range of $30 at the time of the registration down to $1.00 by July 2002,

before any of the alleged omissions was disclosed. The precipitous drop in Leap's stock price could not have been caused by revelations of adverse information not yet made.

The circuit court denied the individual defendants' motion by a one-page order entered September 13, 2005, Appendix B.[1] On September 26, 2005, the individual defendants appealed to the Mississippi supreme court the portion of the order denying the motion to compel arbitration. On October 4, 2005, the individual defendants filed a petition for interlocutory appeal from the portion of the order denying the motion to dismiss. The Mississippi supreme court granted that petition on October 25, 2005, and consolidated both the direct appeal and interlocutory appeal. On November 15, 2007, the Mississippi supreme court entered its decision affirming the order, denying the motion in all respects, and remanding the action to the circuit court. On January 3, 2008, the Mississippi supreme court filed an order staying the mandate pending application to this Court for a writ of certiorari.

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[1] The circuit court also denied the individual defendants' motion as against AWG. The individual defendants appealed from that order and the Mississippi supreme court consolidated the two appeals. On February 19, 2007, AWG agreed to submit its claims to arbitration. Decision at 6 n.1. The Mississippi supreme court dismissed the appeals involving AWG as moot. *Id.* Although that arbitration is proceeding, Petitioners have listed AWG as a Respondent out of an abundance of caution.

D. The Mississippi Supreme Court's Decision

The Mississippi supreme court addressed whether the circuit court had erroneously denied arbitration. Decision ¶¶ 13-19. The Mississippi supreme court acknowledged that application of the Federal Arbitration Act is undisputed. *Id.* ¶ 14. It noted exceptions to the rule that a party cannot be required to arbitrate a dispute he has not agreed to arbitrate. *Id.* ¶¶ 15, 17. It cited to the one sentence of the arbitration provision that "only extends to Leap and AWG as corporate entities: 'any dispute . . . arising under this Agreement or in any way related to this Agreement . . . may be submitted to binding arbitration at the election of either *Buyer* [AWG] or *Seller* [Leap].'" *Id.* ¶ 16 (emphasis added by Mississippi supreme court). The Mississippi supreme court concluded, notwithstanding theories that would bind non-signatories to arbitration by estoppel, that "the issue" is "a rather simple question of contract interpretation." *Id.* ¶¶ 16-18. It repeated the one sentence from the Agreement describing who may elect arbitration and concluded that "because the language of the contract is unquestionable as to who may seek arbitration, the trial court did not err in refusing to compel arbitration." *Id.* ¶¶ 18-19.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD RESOLVE A CONFLICT BETWEEN FEDERAL AND STATE COURTS REGARDING WHETHER UNDER THE FEDERAL ARBITRATION ACT FEDERAL ARBITRAL ESTOPPEL OR STATE LAW APPLIES TO NON-SIGNATORIES

More than twenty years ago, this Court made plain that in determining the arbitrability of a dispute, "[f]ederal law . . . governs that issue in either state or federal court." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). Section 2, the "primary substantive provision of the Act," is a "congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Id.* The effect "is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Id.* The result is that "[t]he Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Id.* at 24-25 (footnote omitted). Where construction of language is at issue, "the parties' intentions control, but those intentions are generously construed as to issues of arbitrability." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985).

Shortly thereafter, this Court held that a provision of the California Labor Law requiring a judicial forum for resolving wage disputes notwithstanding an agreement to arbitrate was preempted because it conflicted with "clear federal policy" that private arbitration agreements be "'rigorously enforced.'" *Perry*, 482 U.S. at 490 (citation omitted). This Court quoted from the language of Section 2, and stated that "state law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." *Id.* at 492. In *First Options of Chicago*, 514 U.S. 938 (1995), this Court addressed whether the arbitrator or the court should decide whether the parties agreed to arbitrate. It rules that "courts generally . . . should apply ordinary state-law principles that govern the formation of contracts." *Id.* at 944.

This Court has also cautioned that in analyzing Section 2, the FAA "seeks broadly to overcome judicial hostility to arbitration agreements and that applies in both federal and state courts." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272 (1995). In *Allied-Bruce* this Court reversed an interpretation by the Alabama supreme court that construed the connection between a termite contract and interstate commerce narrowly such that the FAA was found inapplicable. The Alabama supreme court's requirement that the parties "contemplated interstate activity" at the time they entered the contract was held to be inconsistent with the expansive reach of the FAA.

Id. at 274. The state court's narrow interpretation ran afoul of the "Act's basic purpose, to put arbitration provisions on 'the same footing' as a contract's other terms." *Id.* at 275 (quotation marks and citation omitted); *see id.* at 281. This Court granted certiorari in that case where several state and federal courts followed the narrow interpretation, whereas several federal courts of appeal adhered to a much broader reading. *Id.* at 270.

In following these decisions, federal courts have interpreted Section 2 by applying state law where issues concerning contract formation and validity, among others, are raised. At the same time, federal courts have developed federal jurisprudence where formation and validity is not at issue. Specifically, with great uniformity, federal courts have developed federal arbitral estoppel to extend provisions of a written instrument to include non-signatories. Federal "direct benefits" estoppel would require AWG's members to arbitrate because they directly benefited under the Agreement. Among other things, Leap registered shares provided to AWG so that the stock could be sold, which stock AWG's members bought in the open market. Federal equitable estoppel would also allow the individual defendants to compel arbitration because their alleged roles and the claims against them are inseparable from those of Leap. The analysis federal courts apply would require an examination of the benefits due to AWG's members under the Agreement, the benefits received in fact, the allegations of the Complaint, and the relationship

among the parties. Federal courts do not view as controlling the parties' intent at the time of formation. Instead, they evaluate the parties' conduct before and during litigation to determine whether estoppel as a matter of equity should apply. The notion is that the parties' conduct, rather than an actual signature on a written contract, may manifest an intent to arbitrate.

In stark contrast to the approach taken by federal courts, the Mississippi supreme court has affirmatively chosen to apply state law rather than federal arbitral law. Under Mississippi state law, the courts of that state look only to very specific language in the arbitration clause itself or to detrimental reliance. Thus, in the Decision below, the Mississippi supreme court made no examination of the parities' conduct, or of the benefits derived under the contract by non-signatories, or of the claims asserted in the litigation, or of the asserted connections between non-signatory defendants and the signatories of the underlying agreement. In a series of recent decisions examining the obligations of non-signatories to arbitrate, the Mississippi supreme court has declined to follow federal arbitral law, and has applied state law principles, with a significantly different set of requirements. There is a direct conflict between the Mississippi state court and the federal courts on applying either the "direct benefits" form of estoppel or equitable estoppel to non-signatories.

A series of recent decisions from the Texas supreme court addressing these same theories of estoppel has

repeatedly identified the uncertain state of the law concerning what substantive law governs. That court noted the need for "federal and state law to be as consistent as possible in this area, because federal and state courts have concurrent jurisdiction to enforce the FAA." *In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 739 (Tex. 2005). In expressing frustration over the uncertain state of which law governs, the Texas supreme court noted that "'[t]he federal courts of appeal are currently publishing more than one hundred cases per year substantially dealing with arbitration.'" *In re Merrill Lynch Trust Co. FSB*, 235 S.W.3d 185, 192 n.29 (Tex. 2007) (citation omitted). Many of those decisions are addressing whether disputes between non-signatories are arbitrable under the theories of estoppel argued below. And the fact that the Mississippi supreme court and Texas supreme courts have grappled with this issue repeatedly just in the past several years shows the recurring nature of the issue and the need for certainty in cases subject to the FAA. Accordingly, this Court should grant review to dispel the uncertainty in the law and direct that federal law governs estoppel under this federal statute. *See Martinez v. Court of Appeal*, 528 U.S. 152, 155 (2000); *United States v. Estate of Romani*, 523 U.S. 517, 521-22 (1998).

A. Defendants Relied On Well Recognized Federal Arbitral Estoppel

"Direct Benefits" Estoppel. Courts have recognized that although arbitration is "contractual

by nature," it "'does not follow . . . that under the [Federal Arbitration] Act an obligation to arbitrate attaches only to one who has personally signed the written arbitration provision.'" *Wash. Mut. Fin. Group, LLC v. Bailey*, 364 F.3d 260, 267 (5th Cir. 2004) (alteration in original) (citations omitted). The "direct benefits" species of federal arbitral estoppel estops a non-signatory plaintiff who "'knowingly exploits the agreement containing the arbitration clause.'" *Bridas S.A.P.I.C. v. Gov't of Turkmenistan*, 345 F.3d 347, 361-62 (5th Cir. 2003) (citations omitted).

The plaintiffs knowingly exploited the Agreement between AWG and Leap, even though they did not formally sign the Agreement. Plaintiffs include several directors of AWG. Plaintiffs admitted in their complaint that they provided their consent, as AWG's members, to the Agreement with Leap. And plaintiffs benefited from the Agreement. The Agreement required registration of Leap shares so that AWG could sell those shares. And AWG's members bought those shares, allegedly pursuant to that registration, as a "buy back" of the stock. The complaint alleged that Leap registered the stock as *required by the Agreement* because "*the plan* was always for Leap to sell its stock to the Plaintiffs and other [AWG] members" through an "*integrated series of steps*" and "*connected steps*," in which AWG's sale and plaintiffs' purchases were the "ultimate objective." The Agreement expressly referenced restrictions on distributions by AWG to plaintiffs, as members, and plaintiffs received

proceeds from AWG directly as a result of AWG's contract with Leap. MSCR, Whittington Record 101-94, 229-62.

Federal arbitral law requires the plaintiffs as non-signatories to arbitrate. In *Bailey*, the Fifth Circuit reversed the district court's denial of defendants' motion to compel arbitration where the non-signatory plaintiff spouse joined suit with her husband claiming defendants sold insurance that was not wanted. Her claims arose from the underlying agreements that her husband had signed, which contained an arbitration clause. The wife was estopped to prevent inconsistent positions where on the one hand the underlying transaction granted her rights but she sought to "avoid other parts of the same transaction that she views as a burden – namely, the arbitration agreement." 364 F.3d at 267-68.

Similarly, in *International Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411 (4th Cir. 2000), the non-signatory plaintiff's predecessor ordered a custom saw, whose order led to an agreement between the manufacturer and its distributor. The buyer sued the manufacturer for defects, including breaches of warranty. The Fourth Circuit acknowledged "[w]ell-established common law principles . . . that in an appropriate case a nonsignatory can enforce, or be bound by, an arbitration provision within a contract executed by other parties." *Id.* at 416-17 (footnote omitted). A party "can agree to submit to arbitration by means other than personally

signing a contract containing an arbitration clause." *Id.* at 416. In affirming that the non-signatory buyer was required to arbitrate against the manufacturer, the Fourth Circuit found that the underlying contract provided the factual foundation for the plaintiff's claims and that plaintiff asserted claims "'integrally related to'" the contract. *Id.* at 418 & n.6.

In *American Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349, 353 (2d Cir. 1999), the non-signatory owners of a yacht sued a society that classified the ship to ensure its seaworthiness and compliance with safety regulations. Only the society and the shipbuilder signed the underlying contract providing for arbitration. The Second Circuit reversed the district court's decision holding that the owners were not bound by the arbitration clause. The owners received direct benefits, including the ability to sail under the French flag and the obtaining of lower insurance rates on account of the society's classification. *See Deloitte Noraudit A/S v. Deloitte Haskins & Sells, U.S.*, 9 F.3d 1060, 1064 (2d Cir. 1993).

Equitable Estoppel. The assertions against the individual defendants made clear that they should be allowed to enforce the arbitration requirement. They were charged with substantially interdependent and concerted misconduct with the signatory (Leap). The plaintiffs did not just cite to the Agreement but alleged that the individual defendants were responsible for it. According to the complaint, the Agreement between AWG and Leap was "based on inducements and misrepresentations made by Leap and members

of the Leap Control Group"; certain defendants' "personal[ ] participat[ion] in the negotiations and/or dealings" between Leap and AWG; and a defendant's Officer's Certificate attesting to Leap's representations and warranties in the Agreement. The complaint described the individual defendants as agents, executive officers, directors and controlling persons of Leap, with "direct and supervisory involvement in the day-to-day operations of Leap" and "the power to control the transactions." Plaintiffs alleged control person liability. Leap was an alleged non-party "co-conspirator joint-torfeasor (sic)" with the individual defendants and the latter "conspired to bring about the issuance of Leap Stock." The individual defendants allegedly acted "on behalf of," "in concert or conspiracy with," "aided and abetted," and "carried out a plan, scheme or course of conduct" with Leap. MSCR, Whittington Record 101-94.

Federal estoppel law applies to enable the individual defendants to compel arbitration. In *MS Dealer Service Corp. v. Franklin*, 177 F.3d 942 (11th Cir. 1999), the purchaser of an automobile charged that the dealership and the non-signatory service corporation conspired together to engage in a scheme to defraud buyer by charging excessive amounts for the service contract, and the complaint made reference to the agreement. *Id.* at 947-48. The Eleventh Circuit reversed the dismissal of the petition to compel arbitration, finding two elements of equitable estoppel present. First, the complaint made reference to and presumed the existence of the agreement with

the arbitration clause. Second, the complaint asserted allegations of substantially interdependent and concerted misconduct by both the signatory and non-signatory. *Id.* The claims against the signatory and non-signatory were "'based on the same facts'" and "inherently inseparable." *Id.* at 948 (citation omitted); *see Brown v. Pac. Life Ins. Co.*, 462 F.3d 384, 398-99 & n.10 (5th Cir. 2006); *CD Partners, LLC v. Grizzle*, 424 F.3d 795, 798 (8th Cir. 2005); *JLM Indus. Inc. v. Stolt-Nielsen SA*, 387 F.3d 163, 177-78 & n.7 (2d Cir. 2004); *Choctaw Generation Ltd. P'ship v. Am. Home Assurance Co.*, 271 F.3d 403, 406-07 (2d Cir. 2001); *Letizia v. Prudential Bache Sec., Inc.*, 802 F.2d 1185, 1187-88 (9th Cir. 1986).

Federal courts also recognize the importance of context. In *Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524, 527 (5th Cir. 2000), the Fifth Circuit embraced the theory of equitable estoppel articulated by the Eleventh Circuit as a matter of first impression. *Id.* at 527-28. There, the owner and producers of a movie sued the non-signatory actor and his agency for tortiously interfering with a distribution agreement entered with a non-party. Defendants allegedly sought to pressure the movie distributor to reduce its own obligations to aggressively distribute the film under its agreement, which allegations showed interdependent and concerted misconduct and an intertwining of the claims with the underlying agreement. *Id.* at 528-30. The defendants were entitled to compel arbitration. This was not merely to advance "federal pro-arbitration policy." *Id.* at 528.

Arbitration was also required as a matter of fairness, where litigation tactics showed deliberate decisions to avoid suing the signatory defendant and thereby arbitration and the burdens of the underlying agreement while seeking the benefits of the agreement.

Here, neither AWG's members nor AWG asserted claims in the lawsuits against Leap's successor in interest. With respect to those plaintiffs who filed proofs of claim against Leap in bankruptcy, those plaintiffs ultimately agreed to subordinate their claims to pursue the individual defendants instead. AWG and its members filed nearly identical parallel suits, whose dual suits' only purpose was to give the illusion of separating the issues and parties. Ultimately, AWG agreed to arbitrate, only on the eve of filing its opposition brief in the Mississippi supreme court. Federal courts deplore such tactics. *See id.* at 530 (failure to sue signatory was an "obvious attempt to make an end-run around the arbitration clause"); *In re Oil Spill*, 659 F.2d 789, 795-96 (7th Cir. 1981) (objecting to tactic of joining non-signatory as plaintiff "to defeat the effect of an arbitration agreement").

Federal Arbitral Law Regarding Non-Signatory Plaintiffs And Non-Signatory Defendants. Respondents repeatedly argued that there has been no decision bringing non-signatories on both sides to arbitration. That contention was baseless, particularly in light of the individual defendants' extensive reliance on a decision of the Southern District of Mississippi. The decision in *Mississippi Fleet Card, L.L.C. v. BilStat, Inc.*, 175 F. Supp. 2d

894, 896-97, 899-903 (S.D. Miss. 2001), provided a vivid example of why arbitration may be required against non-signatories on both sides, particularly where members of an entity are at issue, such as an LLC, and where corporations are deemed culpable by virtue of the actions of their officers or directors. There, the court applied both forms of arbitral estoppel to compel arbitration among non-signatory plaintiff members of an LLC and non-signatory defendant officers and directors of the signatory corporation. The LLC had entered into an agreement with BilStat to design and implement a credit card system for the LLC's members. The members purchased goods and services on the credit system but a dispute arose concerning BilStat's misappropriation of cardholder payments. As here, both the LLC and its members filed suit alleging torts but neither the LLC members nor BilStat's officers and directors were signatories. Yet, both the LLC and members alleged identical causes of action and claims relating to the underlying agreement; the agreement referred to the members; the members benefited by using the credit card system; and the signatory, the LLC, "had a substantial interest with regard to the welfare of the individual members." The members were third-party beneficiaries and received direct benefits under the estoppel doctrine. *Id.* at 901-03. The non-signatory defendants were employees, officers or directors of BilStat; were charged with its operations and decisions; the conduct was in furtherance of the obligations underlying the agreement; and the claims amounted to "substantially interdependent and concerted misconduct." *Id.*

at 900-01. Two sets of non-signatories thus were compelled to arbitrate. This decision is hardly unique.[2]

B. The Mississippi Supreme Court Erred In Its Failure To Follow Federal Arbitral Estoppel, Which That Court Has Chosen To Reject In Favor Of Mississippi State Law

The theories of estoppel at issue necessarily implicated other provisions of the Agreement other than the one sentence addressing who could elect arbitration, as well as the allegations that plaintiffs made in their complaint. Federal arbitral law requires such analysis: "'[u]nder the equitable estoppel theory, a court looks *to the parties' conduct after the*

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[2] *See Denney v. BDO Seidman, L.L.P.*, 412 F.3d 58 (2d Cir. 2005) (reversing and requiring district court on remand to consider whether common law principles, including estoppel, required arbitration among non-signatory plaintiffs and defendants where suit alleged defendants acted in concert to defraud plaintiffs and where issues might be intertwined with the underlying agreements); *Johnson v. Polaris Sales, Inc.*, 257 F. Supp. 2d 300, 306-08 (D. Me. 2003) (compelling non-signatory plaintiff owners to arbitrate based on direct benefits and allowing non-signatory defendant to arbitrate based on close relationship and inseparability of claims); *Barrowclough v. Kidder, Peabody & Co.*, 752 F.2d 923, 938-39 (3d Cir. 1985) (guidance on remand directing non-signatory plaintiffs to arbitrate and allowing non-signatory defendants to arbitrate), *overruled on other grounds by Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110 (3d Cir. 1993).

contract was executed.'" *Bridas*, 345 F.3d at 362 (*citing E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S.*, 269 F.3d 187, 200 n.7 (3d Cir. 2001) (emphasis added). In comparison to a theory under a third-party beneficiary analysis, "the snapshot this Court examines under equitable estoppel is much later in time." *Bridas*, 345 F.3d at 362; *see In re Kaiser Group Int'l, Inc.*, 307 B.R. 449, 457 (D. Del. 2004) (court "is not persuaded that the parties' intention at the time of entering into the agreements is dispositive in the context of determining whether equitable estoppel should bind a non-signatory to an agreement with an arbitration clause").

The Mississippi supreme court considered neither the other provisions of the Agreement nor the parties' conduct. The court acknowledged theories by which non-signatories may arbitrate, citing to its earlier decisions (*B.C. Rogers Poultry, Inc. v. Wedgeworth*, 911 So. 2d 483, 491-92 (Miss. 2005); *Adams v. Greenpoint Credit, LLC*, 943 So. 2d 703, 708 (Miss. 2006)), as well as the Fifth Circuit's decision in *Bridas*. Decision ¶ 17. The noted exceptions included a close legal relationship between the signatory and non-signatory, the third-party beneficiary theory and equitable estoppel. *Id.* Yet, the Mississippi supreme court's next sentence was that the issue turns on "a simple question of contract interpretation," in which the "contract clearly reads that disputes may be submitted to arbitration at the election of either Buyer or Seller. Because the defendants are neither

the Buyer nor Seller, they are not entitled to enforce arbitration." *Id.* ¶ 18. The court concluded it "must 'accept the plain meaning of a contract as the intent of the parties if no ambiguity exists.'" *Id.* (*citing, inter alia, Rogers*, 911 So. 2d at 487). Nor did the court distinguish what might estop plaintiffs from relying on their non-signatory status, as opposed to enabling non-signatory defendants to arbitrate based on equitable estoppel. The court stated that the case presented a "unique situation of non-signatories attempting to enforce an arbitration provision against other non-signatories," Decision ¶ 16, but never cited to or addressed *Mississippi Fleet*, upon which defendants relied extensively, or other similar cases.

Although the Mississippi supreme court's failure to follow the federal arbitral law of estoppel is not directly expressed as such in the Decision, the court's citations to certain of its other decisions addressing estoppel under the FAA make that fact clear. Paragraph 15 of the Decision cited to the Mississippi supreme court's decision in *Terminix International, Inc. v. Rice*, 904 So. 2d 1051 (Miss. 2004). There, the husband signed a termite protection agreement with the defendant termite company. He and his wife, a non-signatory, sued when they discovered extensive termite damage to their home. In deciding that the wife was bound by the arbitration clause, the Mississippi supreme court examined federal decisions on direct benefits arbitral estoppel, including the Fifth Circuit's decision in *Bailey*, 364 F.3d 260, among others. 904 So. 2d at 1058. The Mississippi supreme

court stated that "We adopt the same principles announced by the court in *Bailey*, and hold that Mrs. Rice is bound by the arbitration clause in the contract signed by Dr. Rice." *Id.* The Mississippi supreme court did not adhere to the federal arbitral law two years later in *Adams*, as discussed below.

The Decision also referred, Decision ¶¶ 17-18, to the Mississippi supreme court's earlier decision in *Rogers*, 911 So. 2d 483. The *Rogers* court refused to follow the Fifth Circuit's law on equitable estoppel. The issue in *Rogers* was whether the non-signatory defendant bank could compel arbitration based on an agreement between the plaintiff, a contract poultry grower, and the defendant processing company, which ultimately filed for bankruptcy protection. Plaintiff filed suit, claiming that the defendants coerced him to assign collateral and borrow money. In addressing whether the non-signatory bank could compel arbitration under equitable estoppel, the *Rogers* majority considered the Fifth Circuit's decision in *Grigson* but stated it was "not bound to follow" that law. *Id.* at 491. The *Rogers* majority stated that "*state law principles* might provide for the arbitration of disputes between a nonsignatory and a signatory to a contract, where there are allegations of substantially interdependent and concerted misconduct." *Id.* at 491-92 (emphasis added). The *Rogers* court cited to *Terminix* for the proposition that a "non-signatory should have standing to compel arbitration where the non-signatory has a close legal relationship, such as alter ego, parent/subsidiary, or agency relationship,

with a signatory to the agreement." *Id.* at 492.[3] After considering *Grigson* and decisions from other circuits, the *Rogers* court rejected the either/or test, concluding that "a third party who is a non-signatory to a contract should not be able to enforce an arbitration agreement, under the intertwined claims test, where there is no alter ego, parent/subsidiary, agency, other form of close legal relationship alleged, and where the 'intertwined claims' do not depend on the agreement." *Rogers*, 911 So. 2d at 492. Without explanation, the *Rogers* court cited state decisions from Illinois. The *Rogers* court stated that in the absence of both types of allegations, "the Mississippi law of equitable estoppel should first be examined to determine if conditions are present where equity should allow a non-signatory to compel arbitration." *Id.*

The *Rogers* court then stated that Mississippi's law of equitable estoppel "'is an extraordinary remedy and should only be invoked to prevent unconscionable results.'" *Id.* at 491 (citation omitted). Further, Mississippi law requires detrimental reliance in which there is a "belief and reliance on some representation[,] a change of position as a result thereof[,] and detriment or prejudice caused by the change of position." *Id.* In applying this test to the facts, the *Rogers* court required that the non-signatory bank believe the representations in the

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[3] *Terminix* turned, however, on application of the direct benefits form of estoppel. *See* 904 So. 2d at 1058.

underlying agreement, change its position in reliance on the agreement, and suffer detriment as a result. *Id.* at 492-93 ("There is no proof that the Bank relied to its detriment that [plaintiff-signatory] would arbitrate any claim he had against the Bank.").

The Chief Justice dissented in *Rogers*, *inter alia*, for failure to follow the federal arbitral law of estoppel. *Id.* at 493, 496. The *Rogers* dissent cited to *Grigson* among other decisions, and stated that the Fifth Circuit endorsed equitable estoppel "to fulfill federal pro-arbitration policy." *Id.* at 496 (*citing Grigson*, 210 F.3d at 528). The *Rogers* dissent concluded:

> [T]his Court should follow our own federal district courts and Fifth Circuit court opinions for guidance here, rather than relying upon Sixth Circuit views. . . . Since I believe that this Court should adopt the Fifth Circuit and our own federal district court approach and conclude that the Bank of Morton, as a non-signatory defendant, can compel arbitration through the theory of equitable estoppel, I must respectfully dissent.

Rogers, 911 So. 2d at 495-96.

Finally, the Decision cited, Decision ¶¶ 15, 17, to the court's recent decision in *Adams*, which addressed a scenario similar to the one in *Terminix* in which a non-signatory plaintiff claimed no obligation to arbitrate. *Adams*, 943 So. 2d at 708-09. *Adams* concerned purchase agreements in which the non-signatory's parents purchased a mobile home. The *Adams* court found that she was not a third-party

beneficiary under the terms of the agreements, and that equitable estoppel did not compel her to arbitrate. *Id.* Instead of following the federal arbitral law of direct benefit estoppel as the Mississippi supreme court had done in a similar scenario in *Terminix*, *see* 904 So. 2d at 1058, the *Adams* court applied the state law test from *Rogers*, repeating that estoppel is an "extraordinary remedy." *Adams*, 943 So. 2d at 709. The *Adams* court again required detrimental reliance, *but in reverse from Rogers.* The *Adams* court stated that there was no showing that the *signatory* defendant credit company had "relied upon and detrimentally changed its position as a result of representations made by [the non-signatory plaintiff]." *Id.*

Thus, the Decision, and the three decisions of the Mississippi supreme court mentioned therein, have shown a failure to follow the federal arbitral law of estoppel.

C. The Decision Reflects Disagreement And Uncertainty Among State And Federal Courts Whether Federal Arbitral Estoppel Or State Law Applies, Which Uncertainty This Court Alone Can Dispel

Division Among State Courts. There is no doubt that the Mississippi supreme court has chosen – and deliberately so – to apply its own state's law on estoppel to non-signatories under the Federal Arbitration Act rather than adhere to federal arbitral law.

See Rogers, 911 So. 2d at 493-96 (Smith, C.J., dissenting). The California courts have made completely clear that they apply federal arbitral estoppel in these contexts because the issues do not implicate the formation or revocation of the contract. They explicitly reject detrimental reliance. *See Turtle Ridge Media Group, Inc. v. Pac. Bell Directory*, 140 Cal. App. 4th 828, 832-33 & n.5 (2006); *Metalclad Corp. v. Ventana Envtl. Organizational P'ship*, 109 Cal. App. 4th 1705, 1712-13 (2003).

The Texas supreme court has taken a middle of the road approach. In its recent decisions analyzing identical issues as at bar, it has chosen to apply state law, but as "informed by persuasive and well-reasoned federal precedent." *Kellogg*, 166 S.W.3d at 739, 741 (rejecting defendant's request to follow federal arbitral estoppel law and holding as a matter of Texas law that non-signatory subcontractor under a second-tier subcontract was not required to arbitrate its dispute where its quantum meruit claim did not seek "to derive a direct benefit from the contract containing the arbitration provision"). The *Kellogg* court did not apply any form of detrimental reliance or promissory estoppel but examined whether benefits were sought. *Id.* at 740-41.[4]

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[4] Notably, in applying direct benefits estoppel, the Texas supreme court rejected the form of analysis followed in the Mississippi supreme court's Decision. *See Kellogg*, 166 S.W.3d at 740 ("KBR is not a signatory in the fabrication subcontract . . . therefore, the scope of that subcontract's arbitration clause does

(Continued on following page)

A few months later, the Texas supreme court addressed the other direct benefit form of estoppel left unanswered in *Kellogg*, in which a non-signatory may directly benefit from the underlying agreement, based on means other than a lawsuit. *Weekley Homes*, 180 S.W.3d at 132-33. There, the signatory's daughter claimed personal injuries from construction debris when the home that her father built and contracted for suffered defects. The *Weekley* court analyzed federal arbitral direct benefits estoppel, and applied "state law while endeavoring to keep it as consistent as possible with federal law." *Id.* at 131 (footnote omitted). The *Weekley* court held that the non-signatory, having received benefits, including residing in the home, directing many of the construction and repair features, and participating in settlement negotiations, could not avoid arbitration. *Id.* at 131-35. The *Weekley* court discussed that in non-arbitration contexts, courts had applied forms of promissory estoppel where a promisor induces forbearance by another, *id.* at 133, but did not appear to require application of that test to hold the non-signatory estopped.

Just last year, in *Merrill Lynch Trust*, 235 S.W.3d 185, the Texas supreme court analyzed whether a

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not answer whether KBR must arbitrate"). In *In re Weekley Homes, L.P.*, 180 S.W.3d 127, 132-33 (Tex. 2005), the Texas supreme court stated that "the analysis" of direct benefit estoppel "focuses on the nonparty's conduct during the performance of the contract" (footnote omitted).

non-signatory employee of Merrill Lynch, who acted as plaintiffs' financial advisor, and two non-signatory defendant affiliates, could compel arbitration where the plaintiff sued, alleging violations of law in the handling of funds placed in an irrevocable life insurance trust. The *Merrill Lynch* court held that under state law, the employee could arbitrate as "[c]orporations can act only through human agents, and many business related torts can be brought against either a corporation or its employees." *Id.* at 188-89 (footnote omitted). As to the defendant affiliates, the Texas supreme court considered but ultimately rejected the federal arbitral theory which allows estoppel based on allegations of interdependent and concerted misconduct by both a signatory and non-signatory. *Id.* at 191-95. The court found "nothing in Texas contract law" or "settled principles of federal arbitration law" to justify that principle. *Id.* at 195. Two justices concurred in part and dissented in part from the majority decision, cited federal decisions from the Fourth and Fifth Circuits, and stated that "[i]n this case to which the FAA applies, I would follow the stated position of the Federal Fifth Circuit Court of Appeals" until "either the Fifth Circuit of the United States Supreme Court rejects the construct." *Id.* at 201, 205-06 (Hecht, J. and Johnson, J., dissenting).

Uncertainty Concerning Governing Law. In Mississippi and Texas, justices of those states' highest courts have filed dissents over whether the state court should adhere to federal arbitral estoppel law. The Texas supreme court has expressed uncertainty

in each of the above three cases over which law governs. The *Kellogg* court observed that while state law governs the validity of an arbitration agreement, courts are divided in determining the governing law as to non-signatories. *Kellogg*, 166 S.W.3d at 739. It stated that "[t]he FAA does not specify whether state or federal law governs, and the United States Supreme Court has not directly addressed the issue." *Id.* at 738. The *Kellogg* court cited to a number of federal decisions applying federal arbitral estoppel but cited to some of its earlier decisions applying state law, and stated that "We are not convinced that state law plays no role in making this determination." The court expressed the importance "for federal and state law to be as consistent as possible in this area, because federal and state courts have concurrent jurisdiction to enforce the FAA." *Id.* at 739 (*citing Moses H. Cone*, 460 U.S. at 25).

The *Weekley* court stated that it is unclear whether federal or state substantive law governs, noting that the determination of non-signatory arbitrability can "involve aspects of either or both." *Weekley*, 180 S.W.3d at 130-31. Again, the Texas supreme court expressed an interest in having state law be "as consistent as possible with federal law" "[p]ending an answer from the United States Supreme Court." *Id.* It noted that while not deciding the question, the United States Supreme Court "has applied federal substantive law to bind a nonparty to labor-union arbitration, a field in which federal law has traditionally yielded little deference to state

labor-law principles." *Id.* at 131 n.13 (*citing John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 548 (1964)). And again, in *Merrill Lynch Trust*, the Texas supreme court noted that "[u]ntil the United States Supreme Court clarifies whether concerted-misconduct estoppel correctly reflects federal law, or even whether federal or state law governs the issue," today's decision must remain somewhat tentative. 235 S.W.3d at 195 (footnote omitted).

The Fifth Circuit has expressed the same uncertainty, stating that the choice between state or federal arbitral law "is often an uncertain question." *Bailey*, 364 F.3d at 267 n.6. Citing to decisions from the Second, Fourth, Fifth, Seventh, Eighth and Eleventh Circuits, the *Bailey* court observed: "That said, nearly all federal circuit courts . . . have applied the federal substantive law of arbitrability to resolve the issue." *Id.*[5] The Fifth Circuit cited to the Fourth Circuit's decision in *International Paper.* In determining whether the plaintiff non-signatory was bound to arbitrate, the Fourth Circuit addressed this Court's decisions in *First Options*, *Moses H. Cone* and *Perry*. The Fourth Circuit stated that because the determination of whether the plaintiff non-signatory was bound by the arbitration clause in the underlying contract "presents no state law question of contract formation or validity, we look to the 'federal substantive law of

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[5] One exception is *Fleetwood Enterprises v. Gaskamp*, 280 F.3d 1069, 1073-77 (5th Cir. 2002), where the Fifth Circuit applied Texas law.

arbitrability' to resolve this question." *Int'l Paper*, 206 F.3d at 417 n.4. The Fifth Circuit in *Bailey* concurred with that analysis, and stated it is "appropriate to apply the doctrine of equitable estoppel as outlined by federal courts without reference to Mississippi law." 364 F.3d at 267 n.6.[6]

In *Allied-Bruce*, 513 U.S. at 270, this Court granted certiorari when there was a split among state and federal courts in the interpretation of Section 2, particularly where the state court interpretation burdened the "liberal federal policy favoring arbitration agreements." *See id.*; *Moses H. Cone*, 460 U.S. at 24. This Court reiterated that "Congress would not have wanted state and federal courts to reach different outcomes about the validity of arbitration in similar cases." *Allied-Bruce*, 513 U.S. at 272. It stated that the FAA's history "indicates that the Act's supporters saw the Act as part of an effort to make arbitration agreements universally enforceable." *Id.* at 279. Notably, Justice O'Connor expressed her long-held view that the FAA should not apply in state courts, but so long as the United States Supreme Court continued to hold the FAA applicable in state courts, she concurred on the basis that "the Court's construction of § 2 rests largely on *the wisdom of maintaining a uniform standard*." *Id.* at 282 (O'Connor,

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[6] The Fifth Circuit, in contrast, did apply Mississippi state law to examine whether the plaintiffs' illiteracy precluded the formation of an agreement to arbitrate. *See Bailey*, 364 F.3d at 264.

J., concurring) (emphasis added). The Decision of the Mississippi Supreme Court makes manifest there is neither certainty nor uniformity on application of arbitral estoppel to non-signatories. This Court should grant this petition to resolve this uncertainty.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Dated: February 12, 2008

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IN THE SUPREME COURT OF MISSISSIPPI

NO. 2005-IA-01827-SCT

QUALCOMM INCORPORATED

v.

AMERICAN WIRELESS LICENSE GROUP, LLC, AND HOMER A. WHITTINGTON, JR., AS TRUSTEE FOR THE HOMER A. WHITTINGTON, JR. REVOCABLE TRUST, ET AL.

DATE OF JUDGMENT:	09/06/2005
TRIAL JUDGE:	HON. TOMIE T. GREEN
COURT FROM WHICH APPEALED:	HINDS COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANT:	GLENN GATES TAYLOR B. WADE SMITH, IV CHRISTY MICHELLE SPARKS
ATTORNEYS FOR APPELLEES:	EUGENE COURSEY TULLOS PETER J. TEPLEY CHRISTOPHER A. SHAPLEY JOSEPH ANTHONY SCLAFANI MEREDITH JOWERS LEES PAGE ANDERSON POERSCHKE J. MICHAEL REDIKER
NATURE OF THE CASE:	CIVIL – TORTS – OTHER THAN PERSONAL INJURY & PROPERTY DAMAGE

DISPOSITION:	AFFIRMED AND REMANDED – 11/15/2007
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

CONSOLIDATED WITH

NO. 2005-IA-01829-SCT

QUALCOMM INCORPORATED

v.

HOMER A. WHITTINGTON, JR., ET AL.

DATE OF JUDGMENT:	09/06/2005
TRIAL JUDGE:	TOMIE T. GREEN
COURT FROM WHICH APPEALED:	HINDS COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANT:	GLENN GATES TAYLOR B. WADE SMITH, IV CHRISTY MICHELLE SPARKS
ATTORNEYS FOR APPELLEES:	EUGENE COURSEY TULLOS PETER J. TEPLEY CHRISTOPHER A. SHAPLEY JOSEPH ANTHONY SCLAFANI MEREDITH JOWERS LEES PAGE ANDERSON POERSCHKE J. MICHAEL REDIKER

NATURE OF THE CASE: CIVIL – TORTS – OTHER THAN PERSONAL INJURY & PROPERTY DAMAGE

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HARVEY P. WHITE, SCOT B. JARVIS, SUSAN G. SWENSON, THOMAS J. BERNARD, JEFFREY P. WILLIAMS, ANTHONY R. CHASE, MICHAEL B. TARGOFF, JILL E. BARAD, ROBERT C. DYNES, JAMES E. HOFFMANN, STEWART DOUGLAS HUTCHESON, DANIEL O. PEGG, LEONARD C. STEPHENS AND QUALCOMM INCORPORATED

v.

AMERICAN WIRELESS LICENSE GROUP, LLC, AND HOMER A. WHITTINGTON, JR., AS TRUSTEE FOR THE HOMER A. WHITTINGTON, JR. REVOCABLE TRUST, ET AL.

DATE OF JUDGMENT: 09/06/2005

TRIAL JUDGE: TOMIE T. GREEN

COURT FROM WHICH APPEALED: HINDS COUNTY CIRCUIT COURT

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NATURE OF THE CASE:	CIVIL – TORTS – OTHER THAN PERSONAL INJURY & PROPERTY DAMAGE
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STEWART DOUGLAS HUTCHESON, DANIEL O. PEGG, LEONARD C. STEPHENS AND QUALCOMM INCORPORATED

v.

HOMER A. WHITTINGTON, JR., ET AL.

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TRIAL JUDGE:	TOMIE T. GREEN
COURT FROM WHICH APPEALED:	HINDS COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANTS:	DAVID W. CLARK MARY CLAY W. MORGAN GLENN GATES TAYLOR B. WADE SMITH, IV CHRISTY MICHELLE SPARKS
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NATURE OF THE CASE:	CIVIL – TORTS – OTHER THAN PERSONAL INJURY & PROPERTY DAMAGE
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CONSOLIDATED WITH

NO. 2005-CA-01894-SCT

HARVEY P. WHITE, SCOT B. JARVIS, SUSAN G. SWENSON, THOMAS J. BERNARD, JEFFREY P. WILLIAMS, ANTHONY R. CHASE, MICHAEL B. TARGOFF, JILL E. BARAD, ROBERT C. DYNES, JAMES E. HOFFMANN, STEWART DOUGLAS HUTCHESON, DANIEL O. PEGG, LEONARD C. STEPHENS AND QUALCOMM INCORPORATED

v.

AMERICAN WIRELESS LICENSE GROUP, LLC

DATE OF JUDGMENT:	09/06/2005
TRIAL JUDGE:	TOMIE T. GREEN
COURT FROM WHICH APPEALED:	HINDS COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANTS:	DAVID W. CLARK MARY CLAY W. MORGAN GLENN GATES TAYLOR B. WADE SMITH, IV CHRISTY MICHELLE SPARKS
ATTORNEYS FOR APPELLEES:	EUGENE COURSEY TULLOS PETER J. TEPLEY

	CHRISTOPHER A. SHAPLEY J. MICHAEL REDIKER PAGE ANDERSON POERSCHKE MEREDITH JOWERS LEES JOSEPH ANTHONY SCLAFANI
NATURE OF THE CASE:	CIVIL – TORTS – OTHER THAN PERSONAL INJURY & PROPERTY DAMAGE
DISPOSITION:	AFFIRMED AND REMANDED – 11/15/2007
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

CONSOLIDATED WITH

NO. 2005-CA-01895-SCT

HARVEY P. WHITE, SCOT B. JARVIS, SUSAN G. SWENSON, THOMAS J. BERNARD, JEFFREY P. WILLIAMS, ANTHONY R. CHASE, MICHAEL B. TARGOFF, JILL E. BARAD, ROBERT C. DYNES, JAMES E. HOFFMANN, STEWART DOUGLAS HUTCHESON, DANIEL O. PEGG, LEONARD C. STEPHENS

v.

HOMER A. WHITTINGTON, JR., AS TRUSTEE FOR THE HOMER A. WHITTINGTON, JR., REVOCABLE TRUST; ET AL.

DATE OF JUDGMENT:	09/06/2005
TRIAL JUDGE:	TOMIE T. GREEN
COURT FROM WHICH APPEALED:	HINDS COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANTS:	GLENN GATES TAYLOR B. WADE SMITH CHRISTY MICHELLE SPARKS
ATTORNEYS FOR APPELLEES:	EUGENE COURSEY TULLOS PETER J. TEPLEY CHRISTOPHER A. SHAPLEY J. MICHAEL REDIKER PAGE ANDERSON POERSCHKE MEREDITH JOWERS LEES JOSEPH ANTHONY SCLAFANI
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Before DIAZ, P.J., CARLSON and RANDOLPH, JJ.

DIAZ, PRESIDING JUSTICE, FOR THE COURT.

¶1. This case involves civil liability for alleged violations of federal and state securities law and for

fraud. The appeal is from the circuit court's denial of the defendants' motions to dismiss, or, in the alternative, to compel arbitration. Finding that the trial court did not err in denying the motions, we affirm the judgment and remand for further proceedings.

FACTS

¶2. The individual plaintiffs are members of American Wireless License Group (AWG), a Mississippi limited liability company.[1] The individual defendants ("Leap defendants") are current and former officers and directors of Leap Wireless International, Inc., or its successors in interest. Until September 1998, Leap was a subsidiary of the corporate defendant, Qualcomm Incorporated. The plaintiffs allege that Qualcomm still exercised control over Leap during the time period in question.

¶3. On June 8, 2001, Leap transferred approximately 1.9 million shares of unregistered Leap stock to AWG in exchange for wireless telephone licenses. The agreement provided that the shares were to be transferred in a private offering not subject to the registration requirements of the Securities Act of 1933. The agreement also contained a provision that any dispute arising from or related to the agreement

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[1] On February 19, 2007, AWG agreed to submit its claims to arbitration. Accordingly, the appeals involving AWG are hereby dismissed as moot.

would be submitted to binding arbitration at the election of either Leap or AWG.

¶4. Pursuant to the agreement, Leap registered AWG's stock with the Securities and Exchange Commission on June 15, 2001, and AWG began selling its stock on the public market in the fall of 2001. According to the complaint, AWG had disposed of all its Leap stock by December 2001, and it was during this time that the plaintiffs purchased Leap stock on the public market.

¶5. At the time of the June registration, the Leap stock was valued at $30.42 per share. The complaint states that during October through December 2001, when the plaintiffs were buying Leap stock, its value had dropped to between $14.00 and $23.00 per share. On August 14, 2002, Leap announced that it had lost a purchase price adjustment dispute with MCG PCS, Inc., which sold wireless licenses to Leap in 2000. As a result of the MCG award, Leap was forced to file for bankruptcy protection. At the time the lawsuit was filed, the stock was valued below $.30 a share.

¶6. The plaintiffs filed suit against the Leap defendants and Qualcomm, alleging that Leap failed to disclose material facts about the MCG dispute in its communications with the plaintiffs and in various press releases and SEC filings, including the June 2001 registration statement. The plaintiffs claimed liability under Sections 11 and 15 of the Securities Act of 1933, Sections 717(a)(2) and 719 of

the Mississippi Securities Act, and fraudulent misrepresentation.

PROCEDURAL HISTORY

¶7. Both the Leap defendants and Qualcomm filed a motion to dismiss pursuant to Mississippi Rule of Civil Procedure 12(b)(6). Yet, Qualcomm's motion to dismiss was treated as a Rule 56 motion for summary judgment because its submissions went outside the pleadings. In response to Qualcomm's motion, the plaintiffs filed a "Rule 56(f) Affidavit." Rule 56(f) of the Mississippi Rules of Civil Procedure provides, "[s]hould it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may [1] refuse the application for judgment or [2] may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or [3] may make such order as is just." The trial court entered an order denying Qualcomm's motion on the grounds that "a dispute of material fact" existed, but the order made no mention of the plaintiffs' Rule 56(f) motion.

¶8. The trial court's failure to address the Rule 56(f) issue has created confusion among the parties. The plaintiffs assert that because the trial court did not provide them with ten days' notice that Qualcomm's Rule 12(b)(6) motion would be considered a motion for summary judgment, this Court must affirm the trial court pursuant to ***Jones v. Regency Toyota, Inc.,***

798 So. 2d 474, 476 (Miss. 2001). Qualcomm argues that the denial of summary judgment was proper because the trial court implicitly denied relief under Rule 56(f) and the plaintiffs have failed to comply with Rule 56(e). In the alternative, Qualcomm argues that this Court should disregard the additional submissions attached to its motion, and treat it as a motion to dismiss under Rule 12(b)(6).

¶9. Because of the scant record, and because the trial judge did not rule on the Rule 56(f) issue, the Court is not in a position to consider a motion for summary judgment. Discovery has not yet begun; indeed, the defendants have not even filed an answer to the complaint. Accordingly, Qualcomm's claims shall be treated in the context of a motion to dismiss under Rule 12(b)(6).

ISSUES

¶10. On appeal, Qualcomm and the Leap defendants argue: (1) the trial court erred in denying the motions to compel arbitration; (2) the federal securities claims fail because the plaintiffs do not have standing to sue and because the registration statement explicitly warned of the alleged omissions; (3) both the state securities and fraud claims should fail as a matter of law because there is no causal link between the alleged omissions and the plaintiffs' losses, there was adequate disclosure of the risks, and the plaintiffs failed to allege that the defendants acted with the requisite intent; and (4) the Leap

defendants and Qualcomm cannot be liable for Leap's actions because they did not exercise the requisite control over the corporation.

STANDARD OF REVIEW

¶11. Regarding the arbitration issue, it is well established that "[t]he grant or denial of a motion to compel arbitration is reviewed de novo." ***East Ford, Inc. v. Taylor,*** 826 So. 2d 709, 713 (Miss. 2002) (citing ***Webb v. Investacorp, Inc.,*** 89 F.3d 252, 256 (5th Cir. 1996)).

¶12. When reviewing a trial court's grant or denial of a motion to dismiss pursuant to Rule 12(b)(6), this Court also employs de novo review. ***HeartSouth, PLLC v. Boyd,*** 865 So. 2d 1095, 1101 (Miss. 2003) (citing ***Tucker v. Hinds County,*** 558 So. 2d 869, 872 (Miss. 1990)). A Rule 12(b)(6) motion should not be granted unless it appears "to a certainty that the plaintiff is entitled to no relief under any set of facts that could be proved in support the claim." M.R.C.P. 12 cmt.

DISCUSSION

I. Arbitration.

¶13. The threshold question in this case is whether the circuit court erred in denying arbitration, as a finding in favor of arbitration precludes a discussion of the merits. "The court's sole function is to determine whether the claim is referable to arbitration.

Once that determination is made, the court may not delve further into the dispute." ***IP Timberlands Operating Co. v. Denmiss Corp.,*** 726 So.2d 96, 108 (Miss. 1998). *See also* ***AT&T Techs., Inc. v. Commun. Workers of Am.,*** 475 U.S. 643, 649, 106 S. Ct. 1415, 89 L. Ed. 2d 648 (1986) ("[I]n deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claim.").

¶14. The parties in this case do not dispute that the Federal Arbitration Act governs our analysis. This position is consistent with our holding in ***Smith Barney v. Henry,*** 775 So. 2d 722, 725 (Miss. 2001) ("[T]he securities industry, on a national level, meets the minimum threshold of affecting or bearing upon interstate commerce, and thus initiates the Federal Arbitration Act.").

¶15. Under the FAA, this Court must conduct a two-step inquiry: first, whether the parties intended to arbitrate the dispute, and second, if they did intend to arbitrate, "whether legal constraints external to the parties' agreement foreclosed the arbitration of those claims." ***East Ford,*** 826 So. 2d at 713 (quoting ***Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth,*** 473 U.S. 614, 628, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985)). This Court has embraced a "liberal federal policy favoring arbitration agreements" and will liberally construe agreements with a presumption in favor of arbitration. ***Terminex Int'l, Inc. v. Rice,*** 904 So. 2d 1051, 1054 (Miss. 2004). However, because arbitration provisions are contractual in

nature, the general rule is that "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." ***Adams v. Greenpoint Credit, LLC,*** 943 So. 2d 703, 708 (Miss. 2006) (internal citations and quotations omitted). Thus, while "we will read the reach of an arbitration agreement between *parties* broadly, [that] is a different matter from the question of who may invoke its protections." ***Westmoreland v. Sadoux,*** 299 F.3d 462, 465 (5th Cir. 2002) (emphasis supplied). This is so because "[a]n agreement to arbitrate is a waiver of valuable rights that are both personal to the parties and important to the open character of our state and federal judicial systems – an openness this country has been committed to from its inception." ***Id.***

¶16. In this case, we are faced with the unique situation of non-signatories attempting to enforce an arbitration provision against other non-signatories. In addition, the plain language of the arbitration provision only extends to Leap and AWG as corporate entities: "any dispute, claim or controversy arising under this Agreement or in any way related to this Agreement, or its interpretation, enforceability or inapplicability may be submitted to binding arbitration at the election of either *Buyer* [AWG] or *Seller* [Leap]." (emphasis supplied).

¶17. There are exceptions to the general rule that non-signatories may not be bound, which our Court has repeatedly recognized. For instance, a non-signatory may be able to enforce an arbitration agreement against a signatory where the non-signatory has

a close legal relationship with a signatory of the agreement. ***B.C. Rogers Poultry, Inc. v. Wedgeworth,*** 911 So. 2d 483, 491-92 (Miss. 2005) (internal citations omitted). Additionally, a signatory may enforce an arbitration agreement against a non-signatory if the non-signatory is a third-party beneficiary or if the doctrine of equitable estoppel applies. ***Adams,*** 943 So. 2d at 708. *See also* ***Bridas S.A.P.I.C. v. Turkmenistan,*** 345 F.3d 347, 356 (5th Cir. 2003) ("Six theories for binding a nonsignatory to an arbitration agreement have been recognized: (a) incorporation by reference; (b) assumption; (c) agency; (d) veil-piercing/alter ego; (e) estoppel; and (f) third-party beneficiary.") (internal citations omitted).

¶18. The issue in this case is a rather simple question of contract interpretation. By the plain terms of the contract, it is evident that the parties simply did not agree to extend to non-signatories the benefit of the arbitration clause, for they easily could have stated so. The contract clearly reads that disputes may be submitted to arbitration at the election of either Buyer or Seller. Because the defendants are neither the Buyer nor Seller, they are not entitled to enforce arbitration. As we have stated before, this Court must "accept the plain meaning of a contract as the intent of the parties if no ambiguity exists." ***B.C. Rogers,*** 911 So. 2d at 487 (citing ***I.P. Timberlands,*** 726 So. 2d at 108). Moreover, "we do not override the clear intent of the parties, or reach a result inconsistent with the plain text of the contract, simply because the policy favoring arbitration is implicated."

B.C. Rogers, 911 So. 2d at 487 (quoting ***EEOC v. Waffle House, Inc.,*** 534 U.S. 279, 294, 122 S.Ct. 754, 151 L.Ed.2d 755 (2002)).

¶19. Accordingly, because the language of the contract is unquestionable as to who may seek arbitration, the trial court did not err in refusing to compel arbitration.

II. Section 11 Claims.

¶20. Section 11 of the Securities Act of 1933, now codified at 15 U.S.C. § 77k, provides a private damages action to any person who buys securities that were issued pursuant to a false or misleading registration statement. Section 11 provides in pertinent part:

> In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue –
>
> (1) every person who signed the registration statement;
>
> (2) every person who was a director of (or person performing similar functions) or

> partner in, the issuer at the time of the filing of the part of the registration statement with respect to which his liability is asserted . . .

15 U.S.C. 77k(a)."The section was designed to assure compliance with the disclosure provisions of the Act by imposing a stringent standard of liability on the parties who play a direct role in a registered offering." ***Herman & MacLean v. Huddleston,*** 459 U.S. 375, 381-82, 103 S.Ct. 683, 74 L.Ed.2d 548 (1983). "If a plaintiff purchased a security issued pursuant to a registration statement, he need only show a material misstatement or omission to establish his prima facie case." ***Id.*** at 382. Therefore, to state a valid Section 11 claim, a plaintiff must allege (1) that he purchased a security issued pursuant to a registration statement that (2) contained a material misstatement or omission.

A. Standing.

¶21. The defendants argue that the plaintiffs lack standing to bring their Section 11 claims because they cannot prove that the Leap stock they purchased on the public market was issued pursuant to Leap's June 15, 2001 Registration Statement that contained the alleged material misstatements and omissions. The plaintiffs claim that they can "trace" the Leap stock they purchased back to the June 15, 2001 Registration Statement.

¶22. Section 11 provides that "any person acquiring such security" may bring an action for losses caused

by a misstatement or an omission in a registration statement. 15 U.S.C. § 77k(a). "[T]he natural reading of 'any person acquiring such security' is simply that the buyer must have purchased a security issued under the registration statement at issue, rather than some other registration statement." ***Rozenweig v. Azurix Corp.,*** 332 F.3d 854, 873 (5th Cir. 2003) (quoting ***Hertzberg v. Dignity Partners, Inc.,*** 191 F.3d 1076, 1080 (9th Cir. 1999)). Thus, only plaintiffs who have actually purchased "shares issued and sold pursuant to the challenged registration statement" have standing to bring a Section 11 claim. ***7547 Corp. v. Parker & Parsley Dev. Partners, L.P.,*** 38 F.3d 211, 223 (5th Cir. 1994).

¶23. To have standing to assert a Section 11 claim, a plaintiff need not have purchased the stock in the initial public offering covered by the registration statement. ***In re JDN Realty Corp. Sec. Litig.,*** 385 F. Supp. 2d 1345, 1371 (N.D. Ga. 2002). Rather, the plaintiff must merely "be able to trace the purchase of his securities to the registration statement that allegedly violated section 11." ***Id.*** (citations omitted). The federal courts of appeal that have addressed the issue have uniformly held that so-called "aftermarket purchasers" have standing to sue under Section 11. ***See Rozenweig,*** 332 F.3d at 872; ***Demaria v. Anderson,*** 318 F.3d 170, 175-78 (2d Cir. 2003); ***Lee v. Ernst & Young, LLP,*** 294 F.3d 969, 974-78 (8th Cir. 2002); ***Joseph v. Wiles,*** 223 F.3d 1155, 1158-61 (10th Cir. 2000); ***Hertzberg,*** 191 F.3d at 1079-82.

¶24. The plaintiffs purchased Leap shares in the open market. However, the plaintiffs allege in their complaint that the Leap shares they purchased can be traced back to the June 15, 2001 Registration Statement. They allege that "the plan was always for the members of [AWG] to become Leap shareholders." According to their complaint, "Leap was unwilling to directly issue Leap Stock" to the members of AWG because many of them were "unaccredited investors." In order to transfer the Leap stock to the AWG's shareholders, Leap and AWG devised the following three-step mechanism: "(a) Leap would issue Leap Stock to the single entity, [AWG], treating it as the accredited investor; (b) . . . Leap would register the stock for resale in [AWG's] name; (c) the [AWG] members would then buy the Leap Stock back in essentially simultaneous purchases."

¶25. The plaintiffs allege that the scheme was in fact carried out and that they "wound up owning the Leap Stock that had been owned by [AWG]." They claim that AWG and its members used UBS Paine Webber to handle the stock transaction. As stated in their complaint, "UBS Paine Webber handled both sides, selling substantially all of the Leap shares issued in [AWG's] name originally, and buying back the Leap Stock, selling the shares to the [AWG] members (including the Plaintiffs), in simultaneous or virtually simultaneous transactions."

¶26. The plaintiffs have adequately alleged in their complaint that the Leap Stock they purchased is traceable to the June 15, 2001 Registration Statement

filed by Leap. "Plaintiffs have not been required to explain how their shares can be traced; general allegations that plaintiff purchased 'pursuant to' or traceable to false registration statement have been held sufficient to state a claim." ***In re Global Crossing Ltd. Sec. Litig.,*** 313 F. Supp. 2d 189, 207 (S.D.N.Y. 2003) (citing ***Shapiro v. UJB Fin. Corp.,*** 964 F.2d 272, 285-86 (3d Cir. 1992)); ***In re Crazy Eddie Sec. Litig.,*** 747 F. Supp. 850, 854-55 (E.D.N.Y. 1990); ***In re AES Corp. Sec. Litig.,*** 825 F. Supp. 578, 592 (S.D.N.Y. 1993); ***Neuberger v. Shapiro,*** 1998 U.S. Dist. LEXIS 10944 at *7 (E.D. Pa. July 17, 1998)). Accordingly, the plaintiffs have sufficiently pleaded standing to assert their Section 11 claims.

B. Materiality of Alleged Misstatements and Omissions.

¶27. The plaintiffs alleged in their complaint that the June 15, 2001 Registration Statement filed by Leap was false and misleading because it failed to disclose the risks associated with its purchase price adjustment dispute with MCG PCS, Inc. In particular, the plaintiffs alleged that the Registration Statement did not adequately disclose (1) that Leap's dispute with MCG "created the basis for a massive dilution or 'watering' of the Leap [stock] . . . first acquired by [AWG] in June 2001 and then acquired by Plaintiffs in the fall of 2001;" (2) "the amount of shares or dollars that Leap would have to deliver . . . to MCG" if Leap was not successful in arbitration; and (3) that the dispute with MCG "created a

significant risk that Leap's covenants in its lending and financing arrangements would be violated." The Leap defendants assert that they disclosed all of these risks in the Registration Statement.

¶28. An omission is considered material if there is "a substantial likelihood that [its disclosure] would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." ***In re Donald Trump Sec. Litig.,*** 7 F.3d 357, 369 (3d Cir. 1993) (quoting ***TSC Indus., Inc. v. Northway, Inc.,*** 426 U.S. 438, 449, 96 S.Ct. 2126, 2132, 48 L.Ed.2d 757 (1976)). *See also* ***Kapps v. Torch Offshore, Inc.,*** 379 F.3d 207, 216 (5th Cir. 2004). "[I]f the alleged misrepresentations or omissions are so obviously unimportant to an investor that reasonable minds cannot differ on the question of materiality [it is] appropriate for . . . [a] court to rule that the allegations are inactionable as a matter of law." ***Trump,*** 7 F.3d at 369 n.13 (internal quotations and citations omitted).

¶29. With regard to Leap's alleged failure to disclose the risk of dilution and the amount of money or number of shares that Leap would have to deliver to MCG if it was unsuccessful in the adjustment dispute, it is a fact issue whether such information was not adequately disclosed. Leap suggests that the June 15, 2001 Registration Statement warning, "YOUR OWNERSHIP INTEREST IN LEAP WILL BE DILUTED UPON ISSUANCE OF SHARES WE HAVE RESERVED FOR FUTURE ISSUANCE," suffices. Whether such boilerplate language constitutes an

adequate disclosure of the risk of dilution posed by the adjustment dispute is a mixed question of law and fact. Generally such "vague or blanket (boilerplate) disclaimer which merely warns the reader that the investment has risks will ordinarily be inadequate to prevent misinformation. To suffice, the cautionary statements must be substantive and tailored to the specific future projections, estimates or opinions in the [registration statement]." ***Trump,*** 7 F.3d at 371-72. The Registration Statement also stated that "up to 785,598 shares . . . [were] reserved for issuance in connection with our pending acquisition of wireless licenses in Buffalo and Syracuse, New York." MCG's identity as the company from whom the wireless licenses were being purchased was not disclosed; nor was it disclosed that Leap might have to issue 21 million shares to MCG as a result of the dispute, as it eventually did.

¶30. The only information in the Statement regarding the dispute is the following:

> In the pending acquisition of wireless licenses in Buffalo and Syracuse, New York . . . the seller has asserted that based on the results of the recent FCC auction of wireless licenses, it is entitled to a purchase price adjustment that would result in the purchase price being effectively doubled. Under the terms of the agreement, if we are obligated to pay a purchase price adjustment, we [are] entitled to pay such additional amounts in cash or Leap common stock at our discretion.

Although Leap disclosed that a purchase price adjustment might force it to pay double the purchase price, the purchase price was not disclosed. For those reasons, the plaintiffs have sufficiently alleged a material omission in the Registration Statement.

¶31. Regarding Leap's failure to adequately disclose that a potential issuance of shares in connection with the dispute with MCG could violate Leap's lending covenants, the plaintiffs have alleged a material omission. The June 15, 2001 Registration Statement warned that "HIGH LEVELS OF DEBT COULD ADVERSELY AFFECT OUR BUSINESS AND FINANCIAL CONDITION." Whether such boilerplate language constitutes an adequate warning is a mixed question of law and fact. Generally, such statements which are not "substantive [or] tailored to future projections, opinions or estimates" are inadequate.

¶32. We are not the triers of fact; we only determine if there are sufficient facts alleged to survive a motion to dismiss. Because the plaintiffs have alleged sufficient facts to survive a motion to dismiss, the motion was properly denied by the trial court.

III. Section 15 Claims.

¶33. The plaintiffs also assert claims under Section 15 of the 1933 Securities Act against all of the Leap

defendants and Qualcomm.[2] The plaintiffs seek to hold them liable for the allegedly misleading June 15, 2001 Registration Statement on the ground that the defendants "controlled" Leap at the time the Statement was filed.

¶34. Section 15 provides:

> Every person who, by or through stock ownership, agency, or otherwise, or who, pursuant to or in connection with an agreement or understanding with one or more other persons by or through stock ownership, agency, or otherwise, controls any person liable under section 11 or 12 . . . shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person had no knowledge of or reasonable ground to believe in the existence of the facts by reason of which the liability of the controlled person is alleged to exist.

15 U.S.C. § 77o. "The term 'control' . . . means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting

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[2] All of the Leap defendants besides Hoffman, Hutcheson, Pegg and Stephens signed the June 15, 2001 Registration Statement and are subject to liability if the plaintiffs prevail. 15 U.S.C. § 77k(a)(1). The four defendants who did not sign the Statement can only be held liable under Section 15 as controlling persons.

securities, by contract, or otherwise." 17 C.F.R. § 230.405(f).

¶35. The plaintiffs allege that the Leap defendants and Qualcomm all had the "power to control or influence the particular transactions giving rise to the securities violations as alleged herein, and exercised the same." The plaintiffs' complaint alleges in detail how each defendant had control over Leap. The complaint states that "by virtue of their high-level positions, their ownership and contractual rights, their access to information, their participation in and/or awareness of Leap's operations and/or intimate knowledge of the false and misleading reports filed by Leap with the SEC," the defendants were able to influence and control the decision-making of Leap, its disclosure processes, and the Registration Statement. Additionally, the plaintiffs allege that Qualcomm's control over Leap stemmed from "its past and continuing business and financial ties" with Leap, "its very strong contractual rights and 'holds' over Leap," its dominant shareholdings in Leap, and its access to inside information.

¶36. Taking all of the allegations in the complaint as true, the plaintiffs have stated a valid Section 15 claim against all of the defendants sufficient to survive a motion to dismiss. Accordingly, the circuit court correctly denied the motion to dismiss the Section 15 claims.

IV. State-Law Claims.

¶37. The plaintiffs also assert claims under the Mississippi Securities Act (MSA) against the Leap defendants for making material misrepresentations and omissions in connection with the sale of Leap stock. The plaintiffs claim that Leap violated Mississippi Code Section 75-71-717(a)(2) (Rev. 2000), which provides in pertinent part:

> Any person who . . . offers or sells a security by the use of any written or oral communication which contains any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading (the buyer not knowing of the untruth or omission) . . . is liable to the person buying the security from him . . .

¶38. The plaintiffs further allege that these misrepresentations and omissions support a claim for fraud. "In order to establish fraud, the following elements must be proven: (1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) the speaker's intent that the representation should be acted upon by the hearer and in the manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on the representation's truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury." ***Holland v. Mayfield,*** 826 So. 2d 664, 674 (Miss. 1999) (citations omitted).

¶39. The defendants argue that both the state securities and common law fraud claims should fail as a matter of law because: (1) there is no causal link between the alleged omissions and the plaintiffs' losses; (2) there was adequate disclosure of the risks; and (3) the plaintiffs failed to allege that the defendants acted with the requisite intent.

¶40. The plaintiffs allege in their complaint that Leap made multiple written and oral communications which contained material misstatements and omissions of material facts regarding Leap's business operations, including but not limited to the financial implications of the purchase price adjustment dispute with MCG, and that they relied on these communications in deciding to purchase Leap stock. The plaintiffs claim that Leap not only failed to adequately disclose the dispute with MCG in the June 15, 2001 Registration Statement, but also in its quarterly and annual reports filed with the SEC during 2001 and 2002. They also allege that Leap agents and representatives made misstatements and omissions of material fact to the plaintiffs during personal visits and in telephone conversations, faxes, emails, and mailed correspondence.

¶41. The plaintiffs also claim that Leap's misstatements and omissions of material fact were the proximate cause of the damages they incurred in connection with their purchases of Leap stock. *See* ***Russell v. S. Nat'l Foods, Inc.***, 754 So. 2d 1246, 1256 (Miss. 2000) ("[R]ecovery is not permitted if the

proximate cause of the monetary loss is other than the fraud alleged.").

¶42. Contrary to the defendants' assertions, the complaint adequately pleaded a cause of action under both Section 75-71-717(a)(2) and fraud. First, causation is question of fact to be determined by the jury. ***Donald v. AMOCO Prod. Co.,*** 735 So. 2d 161, 174 (Miss. 1999). Likewise, the question of whether the risks were adequately disclosed is a question left to the trier of fact. Therefore, it would be improper to grant a Rule 12(b)(6) motion on these issues.

¶43. Regarding the requisite intent, the plaintiffs allege that the defendants knew that these material omissions were being made: "Each defendant knew and intended that the material omitted facts were not being disclosed to Plaintiffs, and acted with the requisite degree of knowledge or scienter, intending thereby to induce Plaintiffs to pay money for the Leap Stock under circumstances of not knowing the material omitted facts." Taking all of the allegations in their complaint as true, the plaintiffs have stated a valid claim under Section 75-71-717(a)(2) and for fraud. The issue of causation and whether the disclosures were sufficient are questions of fact for the jury, and the plaintiffs adequately pleaded that the defendants acted with the intent required to support a cause of action for fraud. Therefore, the trial court did not err in refusing to grant the motion to dismiss on the Section 75-71-717(a)(2) and fraud claims.

¶44. Finally, the plaintiffs seek to hold the Leap defendants secondarily liable for the misstatements and omissions of material fact made by Leap under Mississippi Code Annotated Section 75-71-719 (Rev. 2000), which provides in relevant part:

> Every person who directly or indirectly controls a seller liable under Section 75-71-717, every partner, officer or director of such a seller, every person occupying a similar status or performing similar functions, every employee of such a seller who materially aids in the sale, and every broker-dealer or agent who materially aids in the sale are also liable jointly and severally with and to the same extent as the seller . . .

The plaintiffs allege in their complaint that the Leap defendants were in control of Leap at the time the misstatements and omissions of material fact were made. As with Section 15 liability, taking those allegations to be true, the plaintiffs have adequately stated a claim for liability under Section 75-71-719 against the Leap defendants. Therefore, the circuit court properly denied the Leap defendants' motion to dismiss the plaintiffs' claims for relief under the MSA.

Conclusion

¶45. Because the plain terms of the contract limit persons who may enforce arbitration, the trial court did not err in denying the motion to compel arbitration. Additionally, the plaintiffs have adequately

pleaded their federal and state claims in order to survive a Rule 12(b)(6) motion to dismiss. For the foregoing reasons, the circuit court's denial of the motions to dismiss, or to compel arbitration, is affirmed, and this case is remanded to the circuit court for proceedings consistent with this opinion.

¶46. **AFFIRMED AND REMANDED.**

SMITH, C.J., WALLER, P.J., EASLEY, CARLSON, RANDOLPH AND LAMAR, JJ., CONCUR. GRAVES AND DICKINSON, JJ., NOT PARTICIPATING.

IN THE CIRCUIT COURT
OF HINDS COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

HOMER A. WHITTINGTON, JR., as Trustee for the Homer A. Whittington, Jr. Revocable Trust; *et al.*, **PLAINTIFF**

VS. **CIVIL ACTION NO. 251-03-175CIV**

HARVEY P. WHITE, et al. **DEFENDANTS**

ORDER

Defendants Harvey P. White, Scot B. Jarvis, Susan G. Swenson, Thomas J. Bernard, Jeffrey P. Williams, Anthony R. Chase, Michael B. Targott, Jill E. Barad, Robert C. Dynes, James E. Hoffman, Stewart Douglas Hutcheson, Daniel O. Pegg, and Leonard C. Stephens (the "Leap Officers and Directors") filed a Motion To Compel Arbitration And Stay Proceedings Or, In The Alternative, To Dismiss Plaintiffs' Complaint in this case. The Motion was thoroughly briefed and fully argued by these Defendants and Plaintiffs. After reviewing the submissions and arguments of the Leap Officers and Directors and Plaintiffs, the Court finds that the Motion is not well taken and should be denied.

IT IS, THEREFORE, ORDERED that the Leap Officers and Directors' Motion To Compel Arbitration And Stay Proceedings Or, In The Alternative, To Dismiss Plaintiffs' Complaint is hereby denied.

IT IS FURTHER ORDERED that all proceedings in this matter are stayed during the pendency of the interlocutory appeal.

SO ORDERED, this 12th day or September, 2005.

/s/ Tomie Green
CIRCUIT JUDGE

Order submitted by:

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